

FEDERAL MAGISTRATES COURT OF AUSTRALIA

LI v MINISTER FOR IMMIGRATION & ANOR

[2007] FMCA 1757

MIGRATION – Visa – Partner (Migrant) (Class BC) visa – Migration Review Tribunal – application for review of MRT decision affirming decision of a delegate of the Minister refusing to grant the applicant a visa – domestic violence – non-judicially determined domestic violence.

Judiciary Act 1903 (Cth), s.39B

Migration Act 1958 (Cth), ss.359, 359A, 359C, 474

Migration Regulations 1994 reg.1.23, 1.24, 1.25, 1.26, 100.221

Applicant:	MAN FA LI
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	MIGRATION REVIEW TRIBUNAL
File Number:	SYG 1307 of 2007
Judgment of:	Scarlett FM
Hearing date:	3 October 2007
Date of Last Submission:	3 October 2007
Delivered at:	Sydney
Delivered on:	3 October 2007

REPRESENTATION

The Applicant: Appeared in person

Solicitors for the Applicant: Nil

Solicitors for the Respondents: Ms Mansour

Solicitors for the Respondents: Clayton Utz

ORDERS

- (1) The application is dismissed.
- (2) The applicant is to pay the first respondent's costs fixed in the sum of \$4,000.00.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
SYDNEY**

SYG 1307 of 2007

MAN FA LI
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

(Revised from transcript)

Application

1. The applicant is a citizen of China. He asks the Court to set aside a decision of the Migration Review Tribunal that was signed on 20th March and handed down on 30th March 2007. The Tribunal affirmed a decision of a delegate of the Minister not to grant the applicant a Partner (Migrant) (Class VC) visa. The applicant asks the Court to declare the Tribunal's decision void and to remit his

application for review of the delegate's decision to the Tribunal for further consideration according to law.

2. The grounds of his application are that he claims the decision is void for jurisdictional error as the Tribunal failed to consider the claim and existence of domestic violence. The background to this matter is that the applicant applied for permanent residence on spouse grounds on 18th November 2003 however, his spouse who was his sponsor had informed the Department that she no longer wished to sponsor him.
3. The delegate Minister then refused to grant the applicant a sub-class 100 visa. That decision was made on 7th June 2005. The applicant then sought review of that decision from the Migration Review Tribunal and the Tribunal affirmed the delegate's decision on 12th May 2006. The applicant then sought judicial review of that decision in the Federal Magistrates Court.
4. On 23rd August 2006 I made orders by consent, granting the application, issuing a writ of certiorari quashing the Tribunal decision and issuing a writ of mandamus requiring the Tribunal to determine the matter according to law. The Tribunal wrote to the applicant on 7th September 2006 advising him that the Court had remitted his case to the Tribunal and informed him that the matter would be allocated to a Tribunal member who may seek further information.
5. The applicant's advisor wrote to the Tribunal on 18th September 2006 advising the Tribunal that the applicant was preparing further evidence and documents in support of the application. The Tribunal wrote to the applicant's advisor on 6th November 2006 in a letter headed "Invitation to Comment on Information." Now that letter referred to the provisions of s.359A of the Migration Act and invited the applicant to comment on the information that on 21st March 2005 the applicant's sponsor had advised the Department that her relationship with the applicant had broken down.
6. The Tribunal told the applicant that that particular piece of information was relevant to the review as it may lead the Tribunal to conclude that he and his sponsor were no longer in a genuine and continuing

relationship as spouses. The letter invited the applicant to comment in writing on that information by 4th December 2006.¹

7. The applicant's advisers wrote to the Tribunal on 21st November 2006 enclosing a statutory declaration from the applicant. The relevant parts of that statutory declaration are the following:

- i) *I did not work on a day in March 2005.*
- ii) *I went to ANZ ATM to check the balance of my account. I found that one week's pay had not been deposited into my account. As I was not able to speak English I went to ANZ Bank in Chinatown to find out whether my boss had paid me for the week.*
- iii) *A bank staff there told me in Chinese "This is the account balance, there was a withdrawal just now".*
- iv) *My wife, Shuk Chung Wan and I had a joint bank account with the ANZ so I knew that my wife must have withdrawn my wage from the account.*
- v) *Around 6 pm to 7 pm my wife came home. I was sitting on a sofa watching television and her son was in his own room.*
- vi) *I said to her, "Why don't you tell me that you withdraw my money; I thought my boss had not paid me for the week when I went to the ANZ in Chinatown to find out?"*
- vii) *My wife said to me, ferociously, "When you give me the \$50,000 otherwise I will take whatever money you have" and she hit me on my chest. I was very scared and I did not dare to say anything.*
- viii) *And she said, "I will cancel my sponsorship and you will have to go back to China again."*
- ix) *I was very scared and worried; I did not know what to do.*

¹ See Court Book at 183

x) *I believe that my wife's behaviour has constituted domestic violence which had led to the breakdown of our marriage.*²

8. The Tribunal wrote to the applicant on 4th December 2006 and invited him to attend a hearing on 2nd February 2007. The applicant confirmed that he had appeared before the Tribunal and advised the Tribunal that he required a Mandarin interpreter. The applicant attended the hearing of the Tribunal on 2nd February 2007 and gave evidence. He told the Tribunal that the marriage had broken down and he does not know whether the sponsor had died; he does not have a child with the sponsor and he claimed to have suffered domestic violence.
9. The Tribunal wrote to the applicant on 2nd February 2007. That letter was again written under the provisions of s.359A of the Migration Act. The letter again invited the applicant to comment in writing on the information that on 21st March 2005 the applicant's sponsor advised the Department that her relationship with the applicant had broken down. The Tribunal asked the applicant to provide additional information under the provisions of s.359 of the Migration Act in particular the Tribunal asked for information about any Court proceedings relating to domestic violence or whether the applicant could provide the three statutory declarations, two by competent persons and one by him or a person on his behalf about the domestic violence.
10. The letter also invited the applicant to provide any information that his spouse had died or that he had a child with his spouse. The letter invited the applicant to provide the information in writing by 2nd March 2007 and advised him that he may request additional time but if the Tribunal did not receive any additional information it may make a decision on review without taking any further action to obtain information. The letter which is comprehensive and helpful can be found at pages 199 to 201 of the Court Book.
11. No further information was provided and the Tribunal signed its decision on 20th March 2007 and handed it down on 30th March. In that decision the Tribunal set out the evidence and in its reasons and finding it claimed that it said that it was satisfied that the letter sent to the applicant on 2nd February 2007 was issued pursuant to s.359 of the

² Court Book at 186

Migration Act. The Tribunal was satisfied that the applicant had not responded to that letter and that the time in which to provide additional information had passed.

12. The Tribunal noted that the applicant at the hearing gave evidence that he could not provide any additional information. The Tribunal then determined, pursuant to s.359C to make a decision on the review without taking any further action to obtain that additional information. The Tribunal referred to the criteria for a sub-class 100 visa and referred in particular to clause 100.221 of the regulations. That sets out the requirements for obtaining a visa in particular it refers to domestic violence committed by the sponsoring spouse or other reasons whereby a visa may be granted, notwithstanding the fact that the partners are no longer together.
13. The Tribunal noted the applicant did not dispute that the relationship with the sponsor had broken down. The Tribunal noted that the applicant had been invited to provide evidence to show that the sponsor had died but had not provided that evidence. There is no evidence to suggest that the sponsor had died. The Tribunal noted that there was no evidence to suggest that the applicant and the spouse have any type of parental responsibility towards a child and they did not have a child together. The Tribunal then considered the applicant's claim to have suffered domestic violence. The Tribunal said at [39]:

The requirements as to the evidence that must be produced in order to establish the visa applicant suffered domestic violence committed by the sponsor are set out above. There is no evidence before the Tribunal to suggest that the visa applicant obtained an Australia Court order, a Court injunction under the Family Law Act 1975 or a conviction or a finding of guilt against the sponsor in respect of an offence of violence against the visa applicant and the Tribunal finds that the visa applicant has not suffered domestic violence as determined judicially.

14. The Tribunal then turned its attention to the evidence required to establish non-judicially determined domestic violence. The Tribunal referred to reg 1.24 and noted that that evidence provided in the form of statutory declaration satisfied the requirements set out in reg 1.25 and reg 1.26. The Tribunal noted that the applicant had not provided

that evidence and it was not satisfied that the applicant suffered non-judicially determined domestic violence.

15. The Tribunal considered the other subparagraphs and regulations and was satisfied that the applicant did not meet any of them and affirmed the decision not to grant a Partner (Migrant) (Class VC) visa to the applicant. The applicant claims that the Tribunal failed to consider his claim and the existence of domestic violence. Quite clearly the Tribunal did consider his claim.
16. The Tribunal considered his claim thoroughly and comprehensively. The applicant's claim, in my view, is really no more than a claim that the Tribunal did not accept his evidence. The fact is that the applicant did not provide to the Tribunal evidence supporting his assertion of domestic violence. The regulations provide for proof of domestic violence for a judicially determined claim and order a non-judicially determined claim for domestic violence.
17. The applicant did not produce any evidence of any Court proceedings relating to domestic violence and the Tribunal quite correctly found that the applicant did not meet the requirement for proving judicially determined domestic violence. The Tribunal invited the applicant to provide evidence in the form of a wife to establish a claim of non-judicially determined domestic violence.
18. The Migration regulations specifically refer to evidence required to establish a claim of non-judicially determined domestic violence. Reg 1.23 of the Migrations Regulations 1994 sets out when a person is taken to have suffered domestic violence and sets out in 1.23(1A) that an application for a visa is taken to include a non-judicially determined claim of domestic violence in which the applicant seeks to satisfy the prescribed criteria that the applicant or another person mentioned in the criterion has suffered domestic violence and either the alleged victim and the alleged perpetrator has made a joint undertaking in relation to proceedings or an alleged victim has presented evidence in accordance with reg 1.24.
19. Reg 1.24 refers to the need for a statutory declaration by or on behalf of an alleged victim under reg 1.25 and two statutory declarations by competent persons under reg 1.26.

20. That is what is required to establish a non-judicially claim of domestic violence. The applicant did not provide it. The applicant did not provide any evidence in support of his assertion that he is a victim of domestic violence. The Tribunal wrote to him in letters under the provisions of s.359 and s.359A and invited him to provide that evidence.
- The Tribunal's letter of 2nd February 2007, written on the day of the hearing invited the applicant to provide that information and it set out what information the Tribunal required.
21. The letter even contained copies of the appropriate regulations. The applicant did not take advantage of the offer given by the Tribunal to provide the Tribunal with information. It is hardly surprising the Tribunal was not satisfied that the applicant suffered domestic violence and affirmed the Delegate's decision. In the absence of any evidence the Tribunal had no option.
22. I am mindful of the fact that the applicant is not legally represented and I have examined the Tribunal decision independently of the applicant's claims or the first respondent's submissions in order to ascertain whether any arguable case of jurisdictional error can be made out. There is no jurisdictional error. The Tribunal decision is a privative clause decision as defined by s.474 of the Migration Act. As a privative clause decision is it not subject to declaration or orders in the nature of certiorari or mandamus. The application will be dismissed.
23. The applicant has been unsuccessful in his claim. It is appropriate to make an order that the applicant should pay the first respondent's costs. The amount of \$4,000.00 is an appropriate figure.

I certify that the preceding twenty-three (23) paragraphs are a true copy of the reasons for judgment of Scarlett FM

Associate: S.Polley

Date: 17 October 2007